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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

No. 1050

CARLETON D. BEH, *Petitioner,*

v.

CITY OF WEST DES MOINES, IOWA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF IOWA

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IN THE

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No.

CARLETON D. BEH, *Petitioner*,

v.

CITY OF WEST DES MOINES, IOWA,
Respondent.

PETITION FOR WRIT OF CERTIORARI

COMES NOW the plaintiff, Carleton D. Beh, and prays for a writ of certiorari to review the judgment of the Supreme Court of the State of Iowa in the case of Carleton D. Beh v. City of West Des Moines, Iowa, Iowa Supreme Court Equity No. 9-51498 reported in 256 Iowa ——, 131 N.W. 2d 488, petition for rehearing denied on January 12, 1965.

Opinion Below

A copy of the opinion of the Iowa Supreme Court is appended to this petition. It is found at 256 Iowa ——, 131 N.W. 2d 488 (1964).

Jurisdiction

The grounds on which the jurisdiction of this Court is invoked are:

The Iowa Supreme Court filed its opinion on November 17, 1964. Due and timely petition for rehearing was filed December 11, 1964 by plaintiff. The plaintiff's petition for rehearing was denied on January 12, 1965.

The jurisdiction of the Court pursuant to 28 U.S.C. 1257(3).

Questions Presented

The questions presented for review are as follows:

1. Whether the levying of a proposed assessment and the taking of the plaintiff's property thereunder where the Iowa statutes made no provision whatsoever for the mailing of notice of assessment to individual taxpayers but rather required only notice of publication is in violation of the requirements of the Fourteenth Amendment?

2. Whether a voluntary mailing of notice to plaintiff taxpayer by the City of West Des Moines, Iowa cured the Fourteenth Amendment due process deficiency arising because of the failure of the Iowa statutes to require any notice other than publication?

3. Whether a valid assessment and levy was made against the property of plaintiff under a statute which contained no provision making it reasonably probable that notice of assessment would be communicated to the plaintiff?

Provisions and Statutes

The constitutional provisions and statutes which this case involves are the following:

The Fourteenth Amendment to the Constitution of the United States, and in particular that portion of Section 1 thereof which provides: ". . . nor shall any State deprive any person of life, liberty or property, without due process of law; . . ."

Section 391.53 of the Code of Iowa, 1962, entitled "Notice of Assessment" which states:

> "After filing the plat and schedule for street improvements or sewers, or the report of cost of oiling, oiling and graveling, or shaling streets, the council shall give notice by two publications in each of two newspapers published in the city, if there be that number, otherwise in one, and by handbills posted in conspicuous places along the line of such street improvement or sewer; but if no such newspaper is published within the limits of such city, then such notice shall be given by posting copies thereof in three public places within its limits. Said notice shall state that said plat and schedule or report are on file in the office of the clerk, and that within twenty days after the first publication all objections thereto, or to the prior proceedings, on account of errors, irregularities, or inequalities, must be made in writing and filed with the clerk."

Statement

The following is a concise statement of the case containing the facts material to your consideration of the questions presented:

This is a street assessment case where the defendant, City of West Des Moines, Iowa, sought to assess the east

eleven acres of plaintiff's 194 acre dairy farm the sum of Twelve Thousand Seven Hundred Fourteen and 07/100 Dollars ($12,714.07). The street assessment and levy was instituted under Chapter 391 of the Iowa Code. At the time of the assessment and levy, the Iowa Code made no provision whatsoever for the mailing of notice of the assessment to individual taxpayers. Rather, the only notice requirements were those contained in Section 391.53 which required only notice of publication in each of two publications published in the city, if there be that number, otherwise in one publication, and by handbills posted in conspicuous places along the line of the particular street improvement.

Prior to the time set for hearing, plaintiff filed with the defendant a "Notice of Objection" as required by law and included therein the following objection:

* * * * *

> "9. The levying of the proposed assessment and the taking of the property of the undersigned thereunder under all of the circumstances and facts existing will constitute a violation of the undersigned taxpayer's rights under the Constitution of the State of Iowa and the Constitution of the United States. . . .
>
> "11. The proceedings under which the City Council of the City of West Des Moines have heretofore acted are illegal." See Record pages 50-51.

On March 19, 1962, the City Council of the City of West Des Moines without oral hearing confirmed and levied assessments against the property of plaintiff totaling Twelve Thousand Seven Hundred Fourteen and 07/100 Dollars ($12,714.07).

Thereafter, due and timely Notice of Appeal was filed by the plaintiff to the District Court of the State of Iowa in and for Polk County. Included in said appeal was the allegation by plaintiff that the assessment was wholly illegal, null and void because:

* * * * *

> "1. The levying of the proposed assessment and the taking of the property of plaintiff-appellant thereunder under all of the circumstances and facts existing will constitute a violation of plaintiff-appellant taxpayer's rights under the Constitution of the State of Iowa and the Constitution of the United States." See Record pages 7-9.

In the trial court, plaintiff's claim of unconstitutionality rested on the fact that the only statutory requirements of notice were those of publication and posting. The defendant showed that it had voluntarily mailed to the plaintiff a notice of the assessment and levy and claimed that this cured whatever constitutional defect there might otherwise be in the Iowa statutes. The claim of plaintiff was that the voluntary mailing of notice did not cure the inherent constitutional deficiency of the statute and that the statute being illegal and void, no valid assessment could be made thereunder.

The constitutional question in the trial court was raised by plaintiff in its pleadings and in particular in Paragraph 6 and Subparagraph 1. The trial court in its findings of fact found that there were two publications and also posting of handbills as required by the Iowa statutes and that in addition the City Clerk mailed an assessment notice to the plaintiff. The following is the entire conclusions of

law of the trial court which referred to the constitutional issue:

> "1. That the City of West Des Moines in applying the Iowa law applied it in a constitutional and legal manner, and the plaintiff's challenge to the law upon the grounds of unconstitutionality cannot be and is not sustained. Nothing more could have been done by the City of West Des Moines to advise the plaintiff of the proceedings which are set out in detail in the early paragraphs of these Findings and Conclusions." See Record page 83.

On appeal to the Iowa Supreme Court, the assignment of error was raised in Division I of plaintiff-appellant's brief and argument as follows:

"DIVISION I

"THE LEVYING OF THE PROPOSED ASSESSMENT AND THE TAKING OF PROPERTY OF PLAINTIFF-APPELLANT THEREUNDER UNDER CHAPTER 391 OF THE CODE OF IOWA AND SECTION 391.53 THEREOF, PRIOR TO ITS AMENDMENT IN 1963, UNDER ALL OF THE CIRCUMSTANCES AND FACTS EXISTING CONSTITUTES A VIOLATION OF PLAINTIFF-APPELLANT TAXPAYER'S RIGHTS UNDER THE CONSTITUTION OF THE STATE OF IOWA AND THE CONSTITUTION OF THE UNITED STATES AND DEPRIVES PLAINTIFF-APPELLANT OF PROPERTY WITHOUT DUE PROCESS OF LAW; AND THE TRIAL COURT ERRED IN HOLDING TO THE CONTRARY.

"Brief Point and Authorities

"Prior to its amendment in 1963 by the General Assembly of the State of Iowa, Section 391.53 of the Iowa Code made no provision whatsoever for the mailing of notice of assessment to individual tax-

payers. The only statutory requirement was notice of publication. Under the *Mullane* case, this statutory procedure offends the due process clause of the Fourteenth Amendment to the Constitution of the United States and Section 9 of Article I of the Constitution of the State of Iowa. Voluntary mailing of notice to the respective taxpayers by the City of West Des Moines does not cure whatever due process deficiency there might otherwise have been.

"Authorities

"Constitution of the United States, Amendment Fourteen.

"Constitution of the State of Iowa, Article I, Section 9.

"Section 391.53, Code of Iowa, 1958.

"Chapter 245, Section 2, Laws of the 60th General Assembly.

"*Meadowbrook Manor, Inc.* v. *City of St. Louis Park,* 104 N.W. 2d 540 (Minn. 1960).

"*Mullane* v. *Central Hanover Bank and Trust Company,* 339 U.S. 306, 70 S.Ct. 652.

"*Ridenour* v. *County of Bay,* 366 Mich. 225, 114 N.W. 2d 172 (1962).

"*Walker* v. *City of Hutchinson,* 352 U.S. 112, 77 S.Ct. 200.

"*Wisconsin Electric Power Co.* v. *City of Milwaukee,* 352 U.S. 948, 958, 77 S.Ct. 324, 351; (See subsequent Wisconsin Supreme Court decision at 81 N.W. 2d 298, 299)."

The Iowa Supreme Court affirmed the trial court on this issue and held that "whatever constitutional deficiencies may have appeared in the statute the method actually used by the council was neither deficient nor ineffective", there-

after making reference to the actual mailing of notice. See 131 N.W. 2d at 492.

Reasons for Granting the Writ

Argument amplifying reasons as relied on for allowance of writ.

The holding of the Iowa Supreme Court is contrary to the long-established proposition of law enunciated by the United States Supreme Court in the case of *Wuchter* v. *Pizzutti*, 276 U.S. 13, 48 S.Ct. 259, 72 L.Ed. 446 (1928). The Iowa Supreme Court ruling is also directly contrary to the unanimous decision of the Michigan Supreme Court in the case of *Ridenour* v. *County of Bay*, 366 Mich. 255, 114 N.W. 2d 172. In holding that the Iowa statutes did not violate the due process requirements of Section 1 of the Fourteenth Amendment of the Constitution, the Iowa Supreme Court decision was not in accord with applicable decisions of this Supreme Court nor was it in accord with the decision of the Michigan Supreme Court on this constitutional question.

In 1928, the United States Supreme Court decided the case of *Wuchter* v. *Pizzutti*, 276 U.S. 13, 48 S.Ct. 259, 72 L.Ed. 446 (1928). The case involved the validity under the Fourteenth Amendment of a New Jersey statute which provided for service of process on non-residents of the state in suits for injury by the negligent operation of automobiles on the highways.

The plaintiff Pizzutti obtained a verdict which was affirmed on appeal in the New Jersey Appellate Court. The defendant appealed to the United States Supreme Court and the case was reversed.

The argument of the defendant was that the statute was void under the Fourteenth Amendment. The plaintiff argued that although not required by statute, the defendant

(plaintiff in error on appeal) was informed of the pending action because service was given him by mail. See 276 U.S. 13-14.

Chief Justice Taft delivered the opinion of the Court. In this opinion, it was pointed out that notice was actually served personally on Wuchter, "although the statute did not require it. . .". See 276 U.S. 15-16.

This is exactly analogous to the facts at bar where prior to its amendment in 1963 by the 60th General Assembly of Iowa Chapter 391 of the Iowa code did not require mailing of notice but the City of West Des Moines nevertheless did mail notice personally to the plaintiff, Carleton D. Beh.

The issue was then stated by Chief Justice Taft at 276 U.S. 18-19:

> "The question made in the present case is whether a statute, making the Secretary of State the person to receive the process, must, in order to be valid, contain a provision making it reasonably probable that notice of the service on the Secretary will be communicated to the non-resident defendant who is sued."

Similarly, under the facts at bar the question is whether or not the statute in order to have been valid should have contained a provision making it reasonably proper that notice of the assessment would be communicated to the property owner.

Chief Justice Taft then analogized certain cases of non-resident corporations, declaring at 276 U.S. 21:

> "Even in cases of non-resident corporations, it has been held that a statute directing service upon them by leaving process with a state official is void if it contains no provision requiring the official, upon whom the service may be made, to give the foreign corpo-

rations notice that suit has been brought and citation served. *Southern Railway Co.* v. *Simon*, 184 Fed. 959, 961; *Gouner* v. *Missouri Valley Bridge Co.*, 123 La. 964. In the latter case, the Louisiana court said in respect to such a law:

> "'This law makes no provision whatever for the service on the defendant. The officer may decline to communicate with the person sued and give no notice whatever; not even by mail. A judgment might be obtained without the least knowledge of the person sued. Under the phrasing of the statute, the duty of the officer begins and ends in his office. If such a judgment were rendered, it could receive no recognition whatever at the place of the domicile. When a petition cannot legally be served on a defendant, the court can exercise no jurisdiction over him. The service defines the court's jurisdiction.'"

After reviewing other similar analogies, the Court turned to the argument that the defendant had actual notice. On this point, the opinion declared at 276 U.S. 24-25:

> "But it is said that the defendant here had actual notice by service out of New Jersey in Pennsylvania. He did not, however, appear in the cause and such notice was not required by the statute. Not having been directed by the statute it cannot, therefore, supply constitutional validity to the statute or to service under it. *Coe* v. *Armour Fertilizer Works*, 237 U.S. 413, 424, 425; *Louisville and Nashville R.R. Co.* v. *Stock Yards Company*, 212 U.S. 132, 144; *Central of Georgia Ry. Co.* v. *Wright*, 207 U.S. 127, 138; *Security Trust Co.* v. *Lexington*, 203 U.S. 323, 333; *Roller* v. *Holly*, 176 U.S. 398, 409; *Stuart* v. *Palmer*, 74 N.Y. 183, 188; *Berryhill* v. *Sepp*, 106, Minn. 458. For these reasons, we think

> that the statute of New Jersey under consideration does not make provision for communication to the proposed defendant, such as to create reasonable probability that he would be made aware of the bringing of the suit."

Thereupon, the judgment was reversed.

Wuchter v. *Pizzutti* was specifically cited by the Michigan Supreme Court in the case of *Ridenour* v. *County of Bay*, 366 Mich. 225, 114 N.W. 2d 172 at 180 (1962). This is the reasoning upon which the *Ridenour* case was founded.

In the *Ridenour* case, the facts showed that there was an actual mailing of notice, but nevertheless the assessment was set aside under a holding that the statute itself in not requiring mailing of notice was unconstitutional. The Michigan Supreme Court specifically held that the fact that notice was actually mailed (even under facts which showed that the Court directed that a mailing be made) did not change the unconstitutional status of the statute. The Michigan statute was set forth at 114 N.W. 2d 174-175 and required only publication. The facts, however, showed at the top of 114 N.W. 2d 175 that although not required by statute, "Notice was also sent by first class mail" to all property owners who owned property which would be subject to the assessment.

Subsequently, it was necessary to revise the plans and a new hearing was had and new notice published in accordance with statute. Then, notice was also sent again by first class mail to every person who was a property owner according to the assessment roll. See 114 N.W. 2d at 175.

Thereafter, the plaintiff commenced the lawsuit and sought to enjoin the issuance of the special assessment bonds. The defendant county filed a cross-bill seeking

validation of the bonds and pursuant to a prayer contained in the cross-bill the trial court entered an order which provided that a copy of the notice of the assessment be served on the plaintiff. After hearing oral arguments, the trial court ". . . entered a second order to show cause and provided for notice to be given by statutory publication *and in addition by first class mail to all persons listed in the special assessment roll . . .*" (Emphasis supplied) See 114 N.W. 2d at 176. Thereafter, the trial court held that the special assessment proceedings were valid.

The issues before the Michigan Supreme Court on appeal included the following at 114 N.W. 2d 177-178:

1. Did the Michigan statute offend the due process clause of the Fourteenth Amendment of the United States Constitution as well as Article 2, Section 16 of the Michigan Constitution where authority was conferred on a court based solely on publication in a newspaper?

2. Did the trial judge-imposed mailing to the respective names and addresses of the actual taxpayers cure whatever due process deficiency there might otherwise have been.

The Michigan Supreme Court squarely answered these questions in favor of the taxpayer, holding at 114 N.W. 2d 178 that the Michigan statute failed to provide for adequate notice to meet the requirements of the due process clauses of the Federal and State Constitutions and in particular cited the United States Supreme Court decision in the Mullane case, supra. Also cited was the subsequent United States Supreme Court decision in *Walker* v. *City of Hutchinson*, supra.

Not only did the Michigan Supreme Court hold that the statute itself was unconstitutional, but it went on to hold that the judge-imposed mailing *did not cure the constitutional defect.* Concluding its discussion on this point, the Michigan Supreme Court held at 114 N.W. 2d 180-181:

> "The constitutionality of the statute is determined by the provisions for notice in the statute itself rather than by the whim and caprice of a court. Judge- or administrator-imposed mailing could not cure the due process deficiency of Act 161, P.A. 1959 and Act 185, P.A. 1957."

Similarly, under the facts at bar the record shows that the City of West Des Moines sought to cure the due process deficiency of Section 391.53 by mailing notice to the respective property owners.

However, the issue then becomes whether or not a statute unconstitutional on its face can have the constitutional defect cured by the whim or caprice of the City Council or City Clerk. Plaintiff-appellant believes that the Michigan Supreme Court correctly determined the status of the law today: Voluntary mailing of notice does not cure the constitutional due process deficiency of the statute.

Since the assessment and the levy against plaintiff's property, the Iowa statute has been amended to require mailing of notice. However, this does not affect the assessment matters which arose under the old statute. The fact of statutory amendment is important and has been referred to in similar situations in other states such as Minnesota. In the case of *Meadowbrook Manor, Inc.* v. *City of St. Louis Park*, 104 N.W. 2d 540 (Minn. 1960), the claim of the taxpayer was that it had not received proper notice and newspaper publication was insufficient. The taxpayer was upheld by the Minnesota Supreme Court. The Minnesota Court referred to the United States Supreme Court Decision of *Wisconsin Electric Power Co.* v. *City of Milwaukee*, 352 U.S. 948, 77 S.Ct. 324, and also, of course, referred to the *Mullane* case. In its opinion, the Supreme

Court referred to the situation in the neighboring state of Wisconsin and declared:

> "It is of interest to note that after the Milwaukee decision the Wisconsin legislature amended the law relating to notice of special assessments by cities and villages to provide that in addition to publication either by posting or in a newspaper having a general circulation in the city or village the notice of hearing shall 'be mailed to every interested person whose post-office address is known or can with reasonable diligence be ascertained at least 10 days before the hearing or proceeding.' Wis.L. 1957, c. 130, Sec. 2."

The reasoning of Chief Justice Taft in *Wuchter* v. *Pizzutti, supra,* and the reasoning of the Michigan Supreme Court in *Ridenour* v. *County of Bay, supra,* are equally applicable to the facts of this case.

Thus, the issue is not whether or not plaintiff-appellant in the facts at bar actually received any notice. This is irrelevant, for prior to its amendment in 1963, the statute was unconstitutional and void and any proceedings under this statute were likewise unconstitutional and void.

Indeed, to have the law any other way would establish a dangerous precedent. Public policy demands that the constitutionality of a statute be determined on the basis of the provisions of that statute rather than on the basis of the whim or caprice of an administrative official or a city council or a city clerk.

The simple fact is that Chapter 391 prior to its amendment in 1963 was void, as was the New Jersey statute in *Wuchter* v. *Pizzutti.* The act of the West Des Moines City Council in mailing written notice did not resurrect the statute nor did the attack of plaintiff Carleton D. Beh in court change the void character of the assessment statute.

The only way the change could be made was in the same manner as it has been made in the neighboring states of Wisconsin and Minnesota: By an act of the State Legislature. This is what was done in 1963 in Iowa.

Conclusion

Justice Thompson of the Supreme Court of Iowa at the time of oral argument when advised of the *Ridenour* case asked how the Michigan Supreme Court was divided in that decision. Certainly, it was most natural for Justice Thompson to expect a division of the Michigan Supreme Court because it has had one of the highest percentages of majority-minority opinions among state supreme courts. However, in the *Ridenour* case the decision of the Michigan Supreme Court was unanimous. This unanimity speaks for itself.

Respectfully submitted,

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(4495-8)

APPENDIX

Filed November 17, 1964

IN THE SUPREME COURT OF IOWA

195
51498

CARLETON D. BEH, *Appellant*,

v.

CITY OF WEST DES MOINES, IOWA, *Appellee*.

Appeal from Polk District Court—Ray C. Fountain, Judge

Appeal from paving assessments against farm land within city limits. Property owner claims lack of due process, improper computation and allocation of assessable cost, and excessive assessments.—Modified and affirmed.

Herrick, Langdon, Sandblom & Belin, of Des Moines, for appellant.

Jack R. Hall, of Des Moines, for appellee.

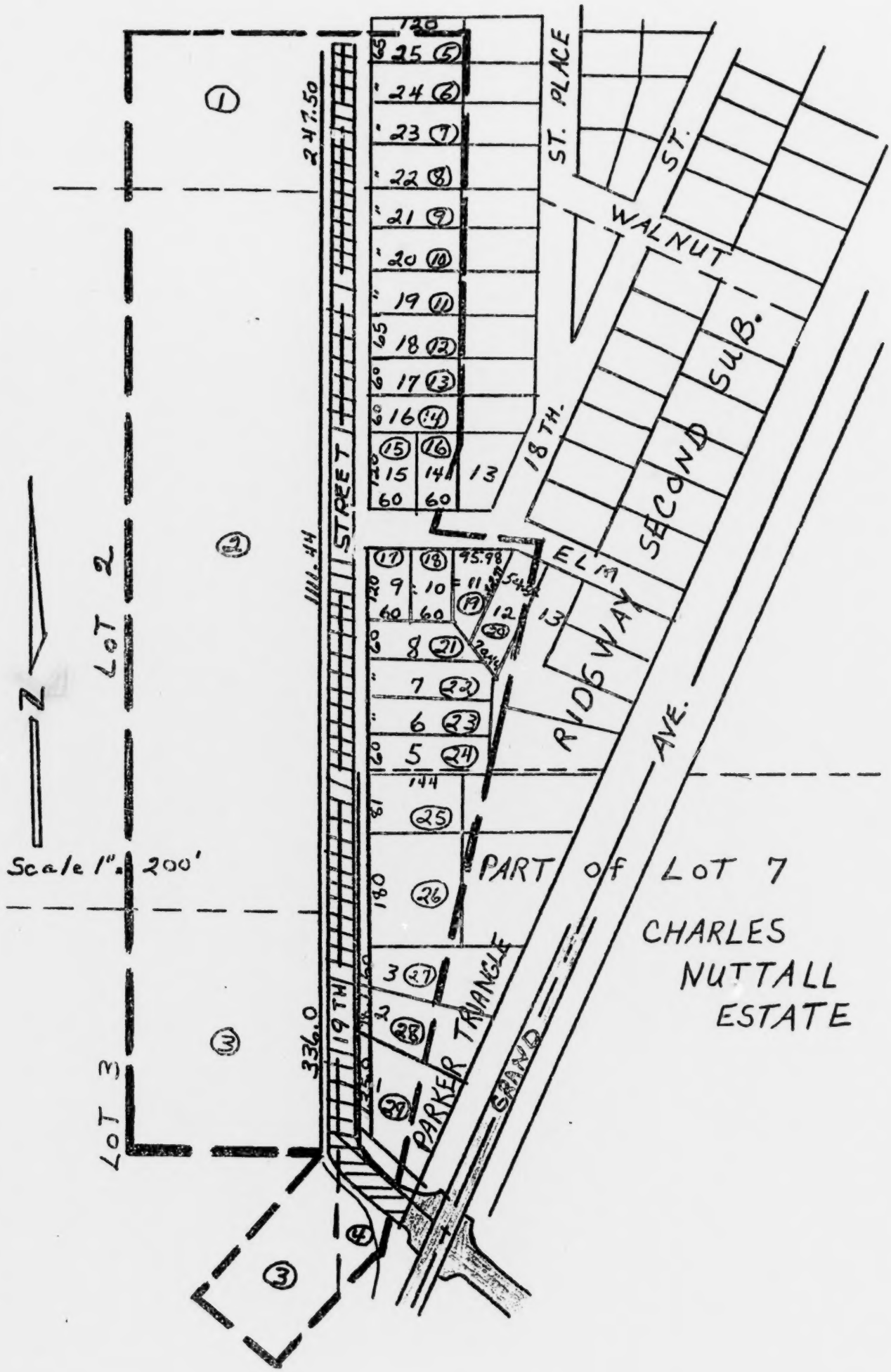
SNELL, J.

This is an appeal by plaintiff, property owner, from paving assessments levied by defendant, City of West Des Moines, to pay for the assessable cost of paving 19th Street along the eastern boundary of plaintiff's property.

19th Street in West Des Moines extends north after a northwest by southeast curve and diagonal crossing of Grand Avenue. The land on the east side of 19th Street has been platted into lots and improved by the construction of homes and in the southern part (lots 27, 28, 29) with commercial buildings. The homes are in the price range from about $14,500 to $18,000. As shown by the plat of the area there is some variation in the size of the lots. By stipulation it was agreed that the 21 properties on the east side of the street had a fair market value of $269,191.00.

Plaintiff's property is along the west side of 19th Street. It is farm land improved and used as a dairy farm under a lease from plaintiff owner to a tenant operator. There are two small homes and extensive improvements for the operation of a dairy farm located thereon. The property has not been subdivided but the north half has been zoned residential, most of the south half agricultural, with a small area in the south zoned industrial.

On the following plat plaintiff's property appears as Tract 2, Tracts 3 and Tract 4 in Lot 2.


LOT 2
LOT 3
Scale 1" = 200'
STREET
19TH.
18TH.
ELM
WALNUT
ST.
ST. PLACE
SECOND SUB.
RIDGE WAY
AVE.
GRAND
PART of LOT 7
CHARLES
NUTTALL
ESTATE
PARKER TRIANGLE
247.50
336.0
144
180
120
65
60
45.98
54.27
79.44

Under the provisions of chapter 391, Code of Iowa, relating to street improvements, sewers and special assessments by cities and towns and prior to the amendments by the 60th General Assembly, defendant city caused 19th Street to be paved. The paving was thirty-six feet wide with integral curbs. The paving was concrete six inches in depth reinforced with steel. The assessments against property were based on the cost of a paving twenty-five feet wide. The cost of paving in excess of twenty-five feet was to be paid as a general obligation of the city.

Pursuant to section 391.39 the special assessments were levied against all lots according to area so as to include one-half of the privately-owned property between 19th Street and the next street, but not for more than 300 feet. The perimeter of the assessment area is shown by the heavy broken line on the plat.

Plaintiff appealed to the district court from the assessments levied by the city council. The district court reduced the assessments. Plaintiff, still dissatisfied, has appealed to us.

I. At the time the assessments were levied section 391.53, Code of Iowa, provided for notice of proposed assessments by newspaper publication and posting. The resolution of the city council directed the appropriate publications and posting. In addition to the statutory notice the city clerk was directed to give notice to each property owner by certified mail. Notice as required by statute and the resolution of the council was given. An assessment notice was sent to plaintiff by certified mail.

Plaintiff filed objections attacking the assessments on 14 numbered grounds including the constitutionality of the notice statute and the jurisdiction of the council to assess.

In 1963 the 60th General Assembly amended section 391.53 of the Code by adding the following:

"The clerk shall send by certified mail to each property owner, whose property is subject to assessment for said improvement, as shown by the records in the office of the county auditor, a copy of the above mentioned notice, said mailing to be made on or before the first publication of

said notice. Failure to receive such mailed notice shall not constitute a defense to the special assessment." Chapter 245, sectio' 2, Laws of the 60th General Asesmbly.

With this amendment the statute now requires the notice the city actually gave.

Plaintiff argues as his first proposition relied on for reversal that section 391.53 as it was in 1962 was violative of due process and unconstitutional.

Plaintiff relies on authorities starting with Mullane v. Central Hanover Bank & Trust Company, 339 U.S. 306, 70 S. Ct. 652, 94 L. Ed. 865 holding notice by publication inadequate.

The Mullane case is well known to the bench and bar. It requires no extensive analysis here. For our present purposes it holds that it is violative of due process to base jurisdiction upon published notice when better means of meeting the purpose of notice are available. We quote briefly from the opinion. Our local citations are to 70 Supreme Court Reporter. " 'The fundamental requisite of due process of law is the opportunity to be heard.' " (loc. cit. 657)

Abundant authority, nowhere challenged, is in accord.

Plaintiff, appellant, argues that a constitutional deficiency in a statute may not be corrected by an administrative or judicially ordered addition to the requirements of the statute. Plaintiff cites and relies heavily on Ridenour v. County of Bay, 366 Mich. 225, 114 N.W. 2d 172. In that case the county and the city of Bay City attempted to create a county board of public works, set up a special assessment district and issue bonds incident to the construction of a sewage disposal system. When the proceedings were attacked by complaint in chancery seeking injunctive relief the court held that the statute providing only for notice by publication was violative of due process. The court then held that the constitutional deficiency was not cured by trial judge-imposed or administrator-imposed mailing of notice.

The reasoning in the opinion is impressive but not controlling here. It goes beyond what is said in the Mullane case and is factually short of the case at bar.

In the case before us there is an additional element not found in the Ridenour case, i.e. response of the property owner to the notice and the filing of objections with the assessing board or council and ruling thereon.

As said in the Mullane case "The fundamental requisite of due process of law is the opportunity to be heard," and the constitutional validity of a method may be defended on the ground that it is reasonably certain to inform those affected.

Whatever constitutional deficiencies may have appeared in the statute the method actually used by the council was neither deficient nor ineffective.

Here plaintiff appellant is a resident of Des Moines. He has owned the farm in adjacent West Des Moines for about forty years. The paving on 19th Street goes past his farm for over 1500 feet. He knew of the improvement. The statutory notice was given. Notice by certified mail as now required was given. Plaintiff was given an opportunity to be heard and he availed himself of that right.

The reasons prompting the holding in the Mullane case and cases based thereon are absent here and the fundamental purpose of the holding in the Mullane case has been accomplished.

Adverting again to the Mullane case we note that there the only notice given was publication in compliance with the minimum requirements of the statute. (loc. cit. 655) The only notice by mail was at the time of the first investment in the common fund. (loc. cit. 655) The court said "we find no tenable ground for dispensing with a serious effort to inform them personally of the accounting, at least by ordinary mail * * * Certainly sending them a copy of the statute months and perhaps years in advance does not answer this purpose." (loc. cit. 659)

The court gave consideration to what is sound, prudent and practical. The court held that meeting the minimum requirements of the statute was inadequate but it did not hold that jurisdictional requirements could not be met by additional circumstances.

Approval of notice by mail was indicated as a practical method of supplementing publication and these words were

quoted with approval: "Great caution should be used not to let fiction deny the fair play that can be secured only by a pretty close adhesion to fact." (loc. cit. 660)

In the case at bar we have had the caution and fair play required by the constitution and the Mullane case.

The situation is not comparable to our special appearance cases where we have held that actual knowledge does not cure a defective original notice. A notice that fails to comply with the statute confers no jurisdiction. An action is commenced by serving an original notice. R. C. P. 48. The contents of a notice are prescribed by R. C. P. 50 and the manner of service by subsequent rules. However, jurisdiction may also rest on a voluntary appearance, Baker v. Baker, 248 Iowa 361, 364, 81 N.W. 2d 1, and when so obtained defects in or lack of notice become immaterial.

Plaintiff appellant has observed that there are no other appeals on this constitutional question and that as the statute has now been amended the issue will not likely recur. Such being the situation it is only necessary for us to hold that plaintiff's constitutional rights have not been violated by lack of due process of law. We need not pass on the constitutionality of the statute before amendment.

II. Section 391.48, Code of Iowa, provides that a "special assessment shall be in proportion to the special benefits conferred upon the property thereby and not in excess of such benefits. Such assessment shall not exceed twenty-five percent of the actual value of the lot at the time of levy, and the last preceding assessment roll shall be taken as prima-facie evidence of such value."

Plaintiff argues that the assessments against his property are violative of this statute.

By stipulation the parties agreed that the fair market value of twenty-one properties on the east side of 19th Street was $269,191. According to plaintiff's computation the assessments against these properties amounted to only 3.64% of this valuation. Plaintiff says that by way of contrast the trial court allowed a full 25% assessment against his property.

The statutory limitations are set forth, supra.

There is nothing in the statute that says various assessments in relation to property value must be proportionate to each other nor that an assessment against an unimproved property may not be higher in relation to total value than an assessment against an improved property.

As long ago as 1916 our court in considering disproportionate assessments said in Benshoof v. City of Iowa Falls, 175 Iowa 30, 42, 156 N.W. 898:

"We would not lay great stress upon the fact that the two neighboring properties, which we have herein specified, were actually improved and that that of the plaintiff was not. We think the mere fact of improvement, or the failure to improve, is not the controlling question. Otherwise, one might be heavily assessed because he had constructed his improvements, and another might escape because he had deferred the construction of improvements upon his property until the paving assessments were fixed. We think, however, that suitability for the purpose of present improvement is always an appropriate consideration. And it may be conceded in this case that plaintiff's property was suitable for substantial and valuable present improvements, although it was on the outside limit of the business district of the town. We are clear also that, where property abuts upon an improved street and is thereby rendered assessable for the improvement, the depth to which such property extends is a consideration which ought not to be overlooked. It is a factor in the area of the property, and such area necessarily affects the benefit to be acquired from the street improvement by the abutting property."

True proportionate equality of assessment based on comparative market value of property affected by the improvement would be almost impossible of accomplishment, would effectually stifle any street improvement past properties of varying value and is not required by the statute.

The assessment against plaintiff's property is not invalid because of lack of equality in the percentage ratio of assessment to total value of the property as compared to improved property.

The assessment must represent a fair proportional part

of the total cost. Rood v. City of Ames, 244 Iowa 1138, 1158, 60 N.W. 2d 227 and cases cited therein.

Fairness in proportional cost is not determined by the percentage ratio of assessment to property value. The premise is not the same. The assessment on an unimproved lot might be proportional to total cost and at the same time be much higher in relation to the lots' value than an assessment on an improved lot.

III. The statute provides that assessments shall be in proportion to the special benefits and not in excess thereof. Plaintiff argues that his property is farm land, that he has no need for or benefit from the paving and that the assessment is greater than the special benefits. The claim of no benefit is a common complaint in assessment cases.

As the court commented in Jackson v. Board of Supervisors, 159 Iowa 673, 678, 140 N.W. 849, "It may be that plaintiff will discover after a few years' use of the property, that it has been benefited more than it appears to be, with this large assessment staring him in the face."

Plaintiff relies heavily and quotes from Rood v. City of Ames, supra. That case involved assessments for construction of a storm sewer to provide drainage. Questions of topography, natural drainage, dominant and servient estates were important in determining benefits both actual and proportionate.

In a drainage case it is obvious that land naturally dry and with natural drainage receives less benefit than low and wet land. In the Rood case it appeared that the land in question was "high, dry and tillable at all times" except for a small depression or "pot hole" that was too low to be drained by the storm sewer. Plaintiff's high ground did not need the improvement and the low ground could not use it.

Here the premise is not the same. In the case before us, plaintiff's property has been and is used as a dairy farm. It has not been subdivided into lots. Plaintiff says he has no plans for subdividing and that the farm has neither need for nor benefit from the paving. His present entrance is from another highway. However, there is nothing in the record to indicate that plaintiff could not subdivide his

property along 19th Street and have as many entrances thereto as necessary. There is nothing to indicate that the part of the farm along 19th Street could not be subdivided and used for residential and commercial purposes without materially interfering with the use of the remaining land as a farm. There would, of course, be some reduction in acreage but otherwise no reduction in utility or convenience.

The witnesses, including those called by plaintiff, agreed that the highest and best use of the property would be for subdivision purposes. Benefits are not necessarily limited by the present use of the property, as future uses and reasonably anticipated prospects may be considered. Rood v. City of Ames, supra, loc. cit. 1158.

Gingles v. City of Onawa, 241 Iowa 492, 41 N.W. 2d 717, was a paving assessment case. Plaintiff claimed first that there was no benefit and second that the assessment was for more than the benefit derived. We said:

"We are convinced, as argued by defendant, that when a city council orders the paving of a street and provides that the cost shall be assessed upon the abutting property, it is a legislative determination that the improvement is expedient and proper and that there is a presumption that the property abutting on the improvement will be benefited thereby and that such determination cannot be set aside in a judicial proceeding."

The opinion then quotes with approval from Chicago, R. I. & P. R. Co. v. City of Centerville, 172 Iowa 444, 153 N.W. 106, as follows:

" 'Speaking generally, there is a fair presumption that all real estate receives some degree of benefit from the permanent improvement of a street upon which it abuts. It is upon such presumption that the whole system of special assessments for local improvements is justified and sustained. Acting upon such presumption, city councils have been clothed with a certain degree of legislative power to determine when it is expedient and proper to pave any given street or streets, and to provide, within certain limitations, how the cost thereof shall be defrayed. * * * the owner of abutting property may object that it has been

over-assessed, he cannot, if the proceedings have otherwise been regular, be heard to say that it is not liable to be assessed at all. * * *

" 'It certainly does not mean that, before such an assessment can be levied and enforced, the city must be able to show that, by reason of the paving, the abutting property has been advanced in market value to the extent of the assessment, or point out in detail the specific way and manner in which the requisite benefits are to be realized in the future. Were such to be the rule, few, if any, schemes of local improvement at the expense of the property immediately affected could ever be accomplished. * * * the benefits to be derived in such cases are ordinarily not instant upon the inception or completion of the improvement, but materialize with the developments of the future. They are none the less benefits because their full fruition is postponed, or because the present use to which the property is devoted is not of a character to be materially affected by the improvement.' "

These pronouncements remain the law. Plaintiff's present limited use of his property as a dairy farm will not support his objections as to benefits.

IV. Plaintiff objects to defendant's method of assessment. Section 391.39 provides for assessment according to area with limitations as to distance from the improvement.

In computing the assessments the city engineer first determined the benefited area, i.e. half way to the next block but not more than three hundred feet. By mathematical computation, involving frontage and depth factor, total cost, points of benefit and cost by point, the assessment was determined. It was based on the premise "that any square foot on the improvement pays the same assessment as any other square foot the same depth on the improvement." There is nothing in the record to indicate that a result other than contemplated by the statute was reached except as noted in the next division.

The assessments as finally made were by action of the city council.

We find nothing illegal or improper in the method of computing the assessments.

The area method which was the basis of the assessment is not invalid. Dunn v. City of Sioux City, 251 Iowa 1279, 1281, 104 N.W. 2d 830.

V. Under the statute an assessment may not exceed 25% of the actual value of the lot involved.

As is frequently the case there was a wide variation in the testimony of the valuation witnesses.

A witness for plaintiff placed a value of $500.00 per acre on the farm as a dairy farm. For other purposes he placed the value at $1,250.00 per acre. For plaintiff's 10.98 acres in the assessment district he placed the value at $2,000 per acre. However, because of the shape and depth of the property it could not all be developed to that full value.

Other witnesses valued plaintiff's 10.98 acres involved as high as $60,000 and the value per front foot as high as $60.00.

The council placed a valuation of $38,900 on item 2; $15,225 on item 3 and $3,500 on item 4.

The farm was subject to a lease with an unexpired term of three years with a renewal option for five years. Because of this lease the trial court concluded that the values as found by the court should be discounted at the rate of 1½% per year or a total of 12%. We find nothing in the record to indicate how much the values should be discounted because of the lease but the figure used by the trial court would appear reasonable and as the city has not appealed we accept the court's computation thereof.

The trial court reduced the valuations and assessments on each of plaintiff's tracts.

The trial court found the reasonable market value of item 2 to be $25.00 per front foot or a total of $27,786.00. Discounting this 12% leaves a value for assessment of $24,452.00. We agree with the trial court as to this item.

The trial court found the reasonable market value of item 3 to be $25.00 per front foot or a total of $8,400.00. Discounting this 12% leaves a value for assessment of $7,392.00.

To what extent this takes into consideration the area of the lower tract numbered 3 does not appear but we agree with the valuation fixed by the trial court as to this item.

Item 4 is a small tract triangular in shape except for a curving frontage on 19th Street. The evidence as to its value is meager. There is evidence that it has a frontage of about 140 feet on the curve in 19th Street. Its depth is up to 50 feet. It varies from two to four feet below street level and is subject to overflow. Its location would be suitable for commercial purposes but its use would require considerable filling.

When broken down as to separate tracts evidence for the plaintiff placed a value thereon of $400.00. Testimony for defendant city placed the value at $1,000.

The trial court placed the value on item 4 at $2,000, discounted 12% leaving a value for assessment purposes at $1,760.

We believe this figure is beyond support in the evidence. We determine the value to be $1,000 subject to the court's discount of 12% leaving an assessment value of $880.

The assessment is limited to 25% of value.

The assessments fixed by the court in the sum of $6,113.00 against item 2 and $1,848.00 against item 3 are approved and affirmed. The assessment against item 4 is reduced to 25% of $880.00 or the sum of $220.00.

Except for the modification as to item 4 the case is affirmed.

Modified and affirmed

Garfield, C. J., Thompson, Peterson, Moore and Stuart, JJ., concur.

Larson and Thornton, JJ., concur except as to Division I.

Hays, J., not sitting.

IN THE DISTRICT COURT OF THE STATE OF IOWA IN AND FOR POLK COUNTY

Equity No. 67754

CARLETON D. BEH, *Plaintiff-Appellant*,

vs.

CITY OF WEST DES MOINES, IOWA, *Defendant-Appellee*.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above entitled cause came on for trial before the Court, the plaintiff appearing in person and by his attorneys, David Belin and A.A. Herrick, and the City of West Des Moines appearing by its attorney, Jack Hall; and the Court having heard the evidence, examined the exhibits and briefs submitted by the respective parties, heard the arguments of counsel, and being fully advised in the premises, now makes the following:

FINDINGS OF FACT

1. That the appellant, Carleton D. Beh, is the owner of a 190 acre dairy farm located wholly within the city limits of the City of West Des Moines, and bounded on the east by 19th street. That said farm is now leased for a gross rental of Six thousand dollars per year under a lease which has three years to run with an option for five more years.

2. That a plat and schedule showing streets to be improved, each lot proposed to be assessed, estimate of the total cost of the improvement, value of each lot as fixed by the City Council, estimate of the amount proposed to be assessed against each lot, etc., was filed in the office of the City Clerk of West Des Moines, and thereafter on March 13, 1961, a Resolution of Necessity was introduced, following which the City Clerk was instructed to cause notice to be published of the pendency of said Resolution and of the time of hearing objections thereto, which was set for 8:00 p. m., April 10, 1961.

3. That pursuant to said Resolution notice was published in the West Des Moines Express covering these matters on March 16 and March 23, 1961.

4. That on March 22, 1961, a copy of said Notice of Hearing on Resolution of Necessity for said street improvement was mailed to each property owner including the plaintiff herein, by certified mail.

5. That as provided in said Notice the City Council met on April 10, 1961, at 8:00 p. m., and adopted the Resolution of Necessity and overruled all objections that had been filed thereto.

6. That also on April 10, 1961, the City Council of West Des Moines (herein referred to as the "City Council") directed the City Clerk to advertise for bids for the construction of said improvement, bids to be received up to 8:00 p. m., May 15, 1961, and further resolved at said meeting that a public hearing on the matter of the adoption of the proposed plans, specifications, and form of contract be held at the same time, and directed that the Clerk give notice by publication at least ten days before said date. Such a notice was published in the West Des Moines Express on April 27, 1961 and on May 4, 1961.

7. At the meeting of the City Council on May 15, 1961, the plans, specifications and form of contract were duly approved, and a contract awarded to Gillotti Construction Company for the construction of portland concrete paving, etc.

8. That on the 31st day of May, 1961, there was filed with the County Auditor of Polk County, Iowa, a certificate of the City Clerk of the City of West Des Moines, Iowa, concerning the above matters, together with the exhibit marked Exhibit B which contained the estimated total cost of the improvement, and schedule of estimated assessments proposed to be made on the benefited properties for the purpose of paying for said improvement.

9. That on October 16, 1961, the City Council met and adopted a resolution accepting the work and ordering the preparation of plat and schedule of assessments.

10. That after there had been prepared and placed on file in the office of the City Clerk a plat and schedule show-

ing the assessments proposed to be made for the improvement involved herein, the City Clerk was directed to give twenty days notice by two publications in a newspaper and by handbills posted at conspicuous places along the line of the improvement, and by certified mail to each property owner whose property was subject to assessment, and requiring that all objections thereto be filed within twenty days after the first publication of notice. That said notice was published on February 1, 1962 and on February 8, 1962.

11. That prior thereto, to-wit: on January 13, 1962, the Clerk of the City of West Des Moines mailed a copy of the assessment notice by certified mail to the plaintiff, Carleton D. Beh, and all other property owners listed in the final plat and schedule of assessments, and on the 31st day of January, 1962,, he posted in conspicuous places along the improvement a handbill assessment notice at the rate of approximately two or more handbill notices along each and every block of said improvement.

12. That thereafter and prior to February 21, 1962, the plaintiff filed with the City Clerk a notice of objection, Exhibit 9 being a carbon copy thereof.

13. That on March 19, 1962, the City Council of West Des Moines overruled the objections theretofore filed by the plaintiff, and after full consideration, appraisement and apportionment of the special benefits conferred upon the property shown on said schedule and plat of said improvement, found that the property was specially benefited by said improvement in the amounts as shown on said schedule, and that said amounts were in proportion to the special benefits conferred upon the property by said improvement, and are not in excess of such benefits and not in excess of 25% of the actual value of the lots, etc., and thereupon approved the schedule of assessments including the assessments against the plaintiff for Items 2, 3 and 4, for paving 19th street in the sums of $8,584.57, $3,429.25 and $700.25 respectively.

14. That on April 2, 1962, the plaintiff appealed said assessments to this court.

15. That the east 300 feet of the plaintiff's property was assessed.

16. That Items 2 and 3 are relatively level and the highest and best use would be for subdivision purposes. The east side of 19th street is occupied by new homes in the value range of $14,500.00 to $18,000.00. Item 2 is zoned for residential purposes and Item 3 is zoned for agriculture purposes. That there is water, gas and electricity available to the property assessed, and sewer is located at 19th and Grand.

17. That Item 4 is zoned for light industry and is near a commercial area.

18. That Items 2 and 3 have a fair and reasonable market value for residential subdivision purposes of $25.00 per front foot; that Item 4 has a value of $2,000.00.

19. That since the property is leased for a possible period of eight years, the present fair and reasonable values should be discounted at the rate of 1½% per year or a total of 12%. Based upon these calculations, Item 2 has a fair and reasonable market value of $27,786.00; however, discounting the same 12% leaves a value of $24,452.00.

20. That Item 3 has a fair and reasonable market value for residential purposes of $8,400.00; discounting the same at 12% leaves a value of $7,392.00.

21. Item 4 having a fair and reasonable value of $2,000, discounting it 12% leaves a value of $1,760.00; making a total value of present worth of $33,604.00.

Conclusions of Law

1. That the City of West Des Moines in applying the Iowa law applied it in a constitutional and legal manner, and the plaintiff's challenge to the law upon the grounds of unconstitutionality cannot be and is not sustained. Nothing more could have been done by the City of West Des Moines to advise the plaintiff of the proceedings which are set out in detail in the early paragraphs of these Findings and Conclusions.

2. That the assessment made by the City of West Des Moines exceeded the 25% value of the property involved and the assessments should be reduced to a sum equal to 25% of the present worth of said real estate, to-wit: Item 2, $6,113.00; Item 3, $1,848.00; Item 4, $440.00, a total of

$8,401.00 together with interest at such rate as the law provides.

Plaintiff may prepare a decree in accordance with these Findings and Conclusions, submit it to counsel for the defendant for approval as to form, and to the Court for signature.

Both parties except.

Signed this 23rd day of September, 1963.

RAY C. FOUNTAIN,
Judge, Ninth Judicial District of Iowa.

Filed Polk County, Ia. 1963 November 29, am 11:46,
Michael H. Doyle, Jr., Clerk District Court

IN THE DISTRICT COURT OF THE STATE OF IOWA IN AND FOR POLK COUNTY

* * * * * * *

Equity No. 67754

CARLETON D. BEH, *Plaintiff-Appellant*,

vs.

CITY OF WEST DES MOINES, IOWA, *Defendant-Appellee*.

* * * * * * *

Now on this 29 day of November, 1963, this matter coming on for hearing for entry of a final decree and the plaintiff-appellant appearing by his attorneys, Allan A. Herrick and David W. Belin of the Law Firm of Herrick, Langdon, Sandblom & Belin, and the defendant-appellee appearing by its attorney, Jack R. Hall, and the Court having heard the evidence, examined the exhibits and briefs submitted by the respective parties, heard the arguments of counsel, and this matter having been fully tried and submitted to the Court and the Court being fully advised in the premises and this matter having been fully tried and submitted to the conclusions of law:

The Court now makes the findings of fact and conclusions of law a part of this decree and incorporates the same by reference herein as though they were set out fully and at length herein.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Court has jurisdiction of the parties and of the subject matter herein;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Court finds that Section 391.53 of the Code of Iowa prior to its amendment in 1963 by the General Assembly of the State of Iowa was not unconstitutional and that the chal-

lenge of plaintiff-appellant to the special assessment on grounds that the statute under which it was levied was unconstitutional cannot be and is not sustained;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the property of plaintiff-appellant assessed by the defendant-appellee has a fair and reasonable market value as follows:

> Item 2 in the assessment, which is one and the same as Tract A referred to in the petition of plaintiff—$24,452.00;
>
> Item 3 in the assessment, which is one and the same as Tract B referred to in the petition of plaintiff—$7,392.00;
>
> Item 4 in the assessment, which is one and the same as Tract C referred to in the petition of plaintiff—$1,760.00;

and that the total of said three items is $33,604.00;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the assessment made by the City of West Des Moines exceeded 25% of the value of the property involved and the assessments should be reduced to a sum equal to 25% of said fair market value of said real estate, to-wit:

> The assessment for Item 2 (Tract A) should be $6,113.00;
>
> The assessment for Item 3 (Tract B) should be $1,848.00;
>
> The assessment for Item 4 (Tract C) should be $440.00;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Office of the Polk County Auditor and the Office of the Polk County Treasurer should vacate the existing assessments made by the defendant-appellee City of West Des Moines and should substitute therefor respectively the aforementioned figures for Items 2, 3 and 4 respectively, and that interest thereon should be computed in the same manner as if the amount of the assessment as decreed by this Court

had been the actual assessment made by the City of West Des Moines at the time it originally filed its schedule of assessments;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the costs of this action are taxed to the defendant-appellee.

RAY C. FOUNTAIN,
Judge, Ninth Judicial District of Iowa.

Approved as to form:

JACK R. HALL,
1020 Savings and Loan Building,
Des Moines, Iowa.